ATTORNEYS GENERAL AND THE PUBLIC PURPOSE DOCTRINE
In November, 1999 Skyes Enterprises, Inc., a Tampa-based owner/operator of call centers, announced that it would be opening a new “state of the art” facility in Eveleth, Minnesota.\(^1\) The new center was heralded by then Governor Jesse Ventura as a welcome tie in “with the technology initiatives currently underway in northeastern Minnesota and throughout the state.”\(^2\) Indeed, after years of coping with the decline of the local iron-ore mining industry, Eveleth was in serious need of economic development. But bringing Skyes to Minnesota’s Iron Range came at a price.

To secure Skyes’ arrival in Evelth, the town agreed to provide the company with a three million dollar cash grant, one million dollars in on-site improvements, and 22 acres of free real estate.\(^3\) Skyes promised employment at the call center would eventually reach 400, but after only two years of operation the company closed the facility.\(^4\) The small number of workers who had been hired lost their jobs, and Skyes sold the property for one and a half-million dollars in profit.\(^5\) Perhaps most importantly, the over four million dollars in public monies invested in the venture by the tiny town, were never recouped.\(^6\)

While it is easy to second-guess the wisdom in doing business with a company known to be rapidly outsourcing its operations overseas,\(^7\) the town of Eveleth may have been more than just shortsighted. It arguably violated the public purpose requirement of

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\(^2\) Id.

\(^3\) Good Jobs First Website, “Corporate Subsidy Watch, Cases Studies, Companies,” http://www.goodjobsfirst.org/corporate_subsidy/sykes_enterprises.cfm

\(^4\) Id.


\(^6\) Eveleth has a population of just under 4,000 people. According to the 2000 national census, the per-capita income of the town is $16,635.

\(^7\) See “Good Jobs First.”
the Minnesota Constitution. Article X of that document contains what is known as a “public purpose clause,” which states, “Taxes . . . shall be levied and collected for public purposes . . .” The judicial doctrine connected to such constitutional provisions, the “public purpose doctrine,” holds that clauses are applied reciprocally to constrain public expenditures as well as taxes. The question this paper seeks to address is whether modern day enforcement of the requirement by state attorneys general could prevent, or at least deter, cities and states from sharing Eveleth’s fate.

As it stands today, the public purpose doctrine is essentially dead. In recent decades, state courts have rejected attempts by private plaintiffs to enforce the public purpose requirement, while state and local governments have gone to ever-greater lengths assisting private enterprises in the name of economic development. There are strong arguments that the doctrine needs to be reinvigorated. This paper addresses what role state attorneys general might have in enforcing the public purpose requirement and whether, by virtue of their unique powers and duties, they might be superior plaintiffs in a public purpose challenge.

Part I of this paper discusses the nature, roots, and current status of the public purpose doctrine. It concludes that the current doctrine is insufficient to address contemporary problems raised by state and local economic development, and that some of the justifications for the doctrine are inapposite at the state level. Part II discusses the power of attorneys general to raise public purpose challenges, some scenarios where that

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8 Art X, sec 1 of the Minnesota Constitution.
9 See n.14.
10 There is by no means consensus that the courts are the proper institution to accomplish this. See Richard Briffault, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L. J. 907, 947 (2003) (advocating political solutions to the contemporary problems raised by state and local economic development). Difficulties with judicial enforcement of the requirement are discussed at the end of section III.
power might be exercised, and the reasoning that might lead to it. Part III addresses three related reasons why the attorney general might be superior to a private plaintiff in a public purpose action, and then briefly analyzes why state courts might be resistant to changing the doctrine regardless of the identity of the plaintiff. Finally, Part IV briefly identifies how state attorneys general might be able to help give effect to the doctrine without going into court. The paper concludes that attorneys general are probably better plaintiffs than private parties in these types of lawsuits, but that wholesale resuscitation of the doctrine is unlikely both because attorneys general have shown little inclination to raise these challenges and because state courts have strong incentives to avoid deciding the messy questions they entail. A determined attorney general, however, may be able to increase compliance with the public purpose requirement through a combination of legal and political efforts.

I

All fifty states have some sort of requirement that government resources be used only for public purposes.\(^\text{11}\) In the vast majority of these states this restriction is constitutional. By one count, forty-six states have express constitutional limits on state and/or local financial assistance for private parties.\(^\text{12}\) And in the remaining states, courts have read in similar requirements from other parts of their constitutions.\(^\text{13}\)

\(^{11}\) The Due Process Clause of the U.S. Constitution also protects against diversion of public resources to exclusively private interests, see \textit{Citizens’ Savings and Loan Association v. Topeka}, 87 U.S. 655 (1874).


\(^{13}\) See, e.g., \textit{Common Cause v. Maine}, 455 A.2d 1, 8 n.5 (Me. 1983) ("The requirement of a ‘public purpose’ as a justification for taxation has been read into [the Maine Constitution’s legislative vesting clause] as a Constitutional limitation on the Legislature’s broad power to make laws for the benefit of the people. [citing cases]").
Where these provisions are express, they typically attach to the state’s taxation power, and have been interpreted to apply reciprocally to appropriations.\textsuperscript{14} Some states are additionally prohibited from the “lending of credit” to private enterprises,\textsuperscript{15} and others face restrictions on their ability to hold private equity.\textsuperscript{16} Taken together these provisions are known as the public purpose requirement, and the judicial doctrine that has grown up around them as the public purpose doctrine.

To understand the current state of the doctrine and how involvement by state attorneys general might shape its future, it is important to examine the origin of the public purpose requirement and history of the doctrine. In his 2003 article, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, Richard Briffault explains how the once vigorously enforced requirement became essentially a “dead letter.” The dramatic “rise and fall” of the public purpose doctrine is primarily the result of far-reaching changes in American political and judicial philosophy over the course of the last hundred years.\textsuperscript{17}

Most of the constitutional provisions were responses to specific events in the mid-19\textsuperscript{th} Century. In the 1820’s and 1830’s states – hoping to repeat New York’s success with the Erie Canal - invested heavily in private transportation companies. When the economy stalled a decade later, many states were left in serious debt and several were forced into defaulting on interest payments.\textsuperscript{18} The resulting amendments and, in the case of newer states, their progeny remained permanently enshrined in states’ constitutions.

\textsuperscript{14} See, e.g., Maready v. City of Winston-Salem, 467 S.E.2d 615, 616 (N.C. 1996).
\textsuperscript{15} See Briffault at 911 n.20.
\textsuperscript{16} See e.g., Art VI, Sec. 29 of the Utah Constitution.
\textsuperscript{17} 34 Rutgers L.J. 907, 939-44, 947 (2003).
\textsuperscript{18} Arkansas, Florida, Michigan, and Minnesota defaulted on all or part of their interest payments. Id. at 911.
long after the crisis passed. After the original purpose behind the requirement was
forgotten or ignored, state courts began to use it as a means of maintaining strict
separation between the public and private spheres. This was the era of *Lochner*, and the
public purpose requirement was often used to strike down social welfare programs and
other initiatives thought to interfere with the liberal workings of the market.\(^{19}\)

By the late 1930’s, however, ideas about the proper role for government in the
market had changed. In the wake of the New Deal, the State came to be regarded as
responsible for correcting market failures and guarding against economic privation. The
courts, in turn, became more sympathetic toward government intervention and
participation in the market.\(^{20}\)

Today the propriety of government’s role in promoting economic development
goes unquestioned. After determining that “the concept of public purpose is not static,”\(^{21}\)
one state court after another has recognized that securing economic benefits from the
private sector is a legitimate goal for government. For example, in *Hayes v. State
Property and Buildings Commission*, the Kentucky Supreme Court declared, “the relief
of unemployment is a public purpose within the purview of the case law and the
constitution.”\(^{22}\) Another court recently stated that, “employment is one of the
government’s principal concerns and . . . indirect economic benefits, such as job creation
and retention, may qualify as valid public purposes.”\(^{23}\) The North Carolina Supreme

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\(^{19}\) *Id.* at 912 n. 26.

\(^{20}\) *Id.* at 941.

\(^{21}\) *Common Cause* at 24. See also, *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 413 (Utah
1986) (“What is public purpose varies and changes with the times”); *Maready* at 620 (“passage of time and
accompanying societal changes” require result different from controlling precedent).

\(^{22}\) 731 S.W.2d 797, 801 (Ky. 1987).

\(^{23}\) *Delogu v. State*, 720 A.2d 1153, 1155 (Me. 1998). See also, *Common Cause*, at 25 (holding that
“indirect economic benefits may be taken into consideration in deciding whether spending by the state is
justified”).
court found that as of 1996 no fewer than “forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives.”

A more modern approach toward political economy was not the only factor motivating courts to relax the public purpose doctrine. At least in matters where individual rights were not at stake, the death of *Lochner* heralded a new era of judicial modesty vis-à-vis the legislature. According to Briffault, state courts “may have been influenced by the United States Supreme Court’s post-New Deal jurisprudence treating economic and social issues as political matters for legislative determination, rather than constitutional issues for the courts.” As a result, state courts increasingly deferred to the legislature on questions of public purpose, asserting that branch of government to be the more competent and accountable.

This approach lead to great deference toward the legislature, not only in terms of what may constitute a valid public purpose, but also as to what means the legislature may select to achieve that purpose. Here many state courts have fallen back on the familiar standard of rationality review. While others require only a showing that the state’s plan will provide some minimum benefit, direct or indirect, to the public. In any

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24 *Maready* at 622.
25 *Briffault* at 941.
26 *Id.*
27 See e.g., *Wilkinson* at 412 (legislative findings that monetary aid to high-tech firms furthers the public purpose “entitled to respect weight by the judiciary and should not be overturned unless palpably erroneous”).
28 See *Deloug* at 1155 (citing *Common Cause* for the rule that “a court should ‘invalidate expenditures only when the Legislature’s decision has no rational basis’”).
29 *Briffault* at 914 (citing *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998)).
event, a plaintiff needs to show more than that his “economic forecasts differ from those of the legislature.”

Thus, the public purpose requirement today borders on a tautology. An act is in the public purpose if the legislature declares it to be so, and the methods selected for achieving this purpose, no matter how dubious their prospects for success are, are largely outside the scope of the court’s review.

There are arguably serious problems in this approach. To the extent that it has been influenced by federal courts doctrine, the analogy is flawed. First, unlike at the federal level, the accountability justification has less bite. Many, if not most, state judges are elected and do not serve life terms. While clearly not in the same position in relation to the people as the legislature, state courts are not as entrenched or removed an institution as the federal judiciary. Their judgments on legislation, therefore, are less counter-majoritarian. Second, federal courts deference to the legislature on matters of industrial policy occurs largely in the context of constitutional silence. By contrast the current doctrine embraced by most state courts essentially reads express public purpose requirements directly out of their respective constitutions.

Further, the public purpose requirement exists for a reason. Coercive taxation is only justified by assumption that government will put the revenue toward the public good. Public choice theory suggests that the structure of the legislative process is such that government will always be tempted to confer highly visible benefits on small organized groups while dispersing hidden costs among the general public. The public

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30 Wilkinson at 413 (quotation marks omitted).
31 Briffault at 941.
32 Id. at 945.
33 Eskridge, Frickey & Garrett, Legislation: Statutes and the Creation of Public Policy (3rd ed 2001)
purpose requirement was created to prevent the most egregious instances of this: where the benefits provided do not flow to the public at all. Finally, in the absence of a coherent national industrial policy, the last few decades have born witness to ruinous competition between states and localities for so-called economic development. Clever private interests have shown themselves to be adept at playing these governments against each other, often at a net loss for both sides.\textsuperscript{34} Because much of this competition is effectuated through state action that is in tension with the public purpose requirement, there is reason to believe more rigorous enforcement of the requirement could mitigate some of this competition’s worst consequences.

\section*{II}
Unlike at the federal level, state attorneys general occupy an office that is normally independent from the rest of the executive branch. In fact, only two out of the country’s fifty state attorneys general serve at the will of the governor.\textsuperscript{35} Because of his independence, the attorney general is in the unusual position of being simultaneously counsel to the executive branch and advocate for the public’s interest. At times these duties conflict, and the attorney general may wish to take a legal position contrary to that preferred by his client in the executive branch. In more extreme circumstances, the attorney general may feel compelled to bring suit against an organ of the executive branch to prevent a lawless action or the implementation of an unconstitutional statute.

\textsuperscript{34} Briffault at 947 (citing Jones & Bachelor, “Local Policy Discretion and Corporate Surplus”, Urban Economic Development 223-44 (Bingham & Blair eds., 1984)); see also Good Jobs First Website, “How Site Location Consultants Manipulate Corporate Investment Decisions.”

In either case, the attorney general’s ability to break with the executive branch depends on the law of the state he serves, and there are some that do not permit such intransigence.\textsuperscript{36} However, most states do, in one form or another, recognize the attorney general’s common law power – and in some states, statutory power – to take legal positions independent from and adverse to his clients in the executive branch.\textsuperscript{37}

Courts in those states that prohibit the attorney general from acting against the wishes of the governor or other executive department that he is statutorily required to represent tend to follow the reasoning of \textit{People ex rel Deukmejian v. California}.\textsuperscript{38} In that case the California Supreme Court held the state attorney general to be subject to the traditional bonds of an attorney-client relationship. Thus, the attorney general was restrained from taking a legal position “adverse to his clients or former clients.”\textsuperscript{39} Because, in a \textit{Deukmejian} state, all, or nearly all, executive departments are the attorney general’s clients, he will have to defer to their chosen legal positions and preferences on litigation strategy.

This restricts the chances that an attorney general in such a state will have to challenge a state action under the public purpose requirement. The majority of public purpose challenges seek to attack legislation that authorizes some executive agency or locality to grant a tax abatement, give property, finance, or otherwise confer a benefit to a private entity. In such cases, it is probable that the governor himself signed the law and thus supports the project and believes it to be constitutional. In fact, officials in the

\textsuperscript{36} See e.g., California, West Virginia, and Arizona as discussed in \textit{Marshall} at 2451-63.
\textsuperscript{37} \textit{Id.}, discussing \textit{inter alia} case law in Colorado, Massachusetts, and South Carolina.
\textsuperscript{38} 624 P.2d 1206.
\textsuperscript{39} \textit{Id.} at 1209
executive branch may have, in many cases, been the catalyst for deal.\textsuperscript{40} Thus, any challenge by the attorney general will likely be adverse to the legal position taken by the governor or some other client agency in the executive branch.

Nevertheless, there may be limited instances where the attorney general in a \textit{Deukmejian} state would be allowed to raise a public purpose challenge. First, if there is disagreement among client agencies in the executive branch over whether a statute comports with the public purpose requirement, most states will allow for dual representation.\textsuperscript{41} At least one public purpose case reveals such a disagreement although the Attorney General there ended up only representing the defendant commission.\textsuperscript{42} Another opportunity for an attorney general in such a state to get involved as plaintiff in public purpose action would be in suit against a locality. Cities and counties are often named defendants in public purpose cases.\textsuperscript{43} A home-rule municipality will often act pursuant to delegated as opposed to specific legislative authority. When this happens, the governor might permit or even urge the attorney general to go forward with a public purpose case. Finally, an attorney general might sue a state agency that he is not statutorily obligated to represent. In \textit{Utah Technology Corp. v. Wilkinson}, for example, the Attorney General brought a public purpose challenge against an independent public nonprofit corporation that had been statutorily authorized to retain independent legal counsel.\textsuperscript{44} While it not clear that the suit would have been precluded even if the Attorney

\textsuperscript{40} See e.g., \textit{Hayes v. State Property and Buildings Commission of Kentucky}, 731 S.W.2d 797, 798 (Ky.1987); \textit{Common Cause v. Maine}, 455 A.2d 1, 4 (Me. 1983).

\textsuperscript{41} \textit{Marshall}, at 2459 n.85.

\textsuperscript{42} \textit{Hayes} at 799 (state budget director suing state commission charged with purchasing and conveying real property to Toyota Motor Corp).


\textsuperscript{44} 723 P.2d 406, 414 (Utah 1986).
General were required to represent the corporation, the absence of a traditional attorney-client relationship clearly removed any potential conflict.

In the majority of states, attorneys general need not rely on these special circumstances to enforce the public purpose requirement. *People ex rel Salazar v. Davidson*, is a recent example of such an intra-executive branch suit.⁴⁵ There, the Colorado Supreme Court recognized the role an independent attorney general can play vindicating the rights of the general public and checking lawless action by the executive. At least one theorist has argued that the capacity to launch such suits may be beneficial in that it fosters intra-branch deliberation, provides additional checks and balances, and maintains a kind of comparative advantage within the executive branch.⁴⁶ The argument is that the attorney general’s independent constituency, separation from the legislative process, and overall legal expertise put him, rather than the governor, in the best position to gauge the constitutionality of executive action.⁴⁷

The question of when an attorney general on his own prerogative would be likely to institute an action to enforce the public purpose requirement is more complicated than that of whether he would be allowed to do so. Presumably, he would be tempted to do so when he believed the state’s action to be in violation of the constitution. The question is whose interpretation of the state constitution should guide the inquiry. As noted above, most state courts have for all intents and purposes read these provisions out of the constitution. To the extent that the attorney general understands this judicial gloss to be akin to the text itself, his hands may be tied. However, the public purpose doctrine expressly recognizes that the concept of “public purpose” is fluid rather than static. This

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⁴⁵ 79 P.3d 1221 (Colo. 2003).
⁴⁶ *Marshall*, 2461-63
⁴⁷ *Id.*
is the very argument state courts have used to distinguish contemporary cases from their more restrictive precedents. Surely this leaves the door open continually revisiting public purpose decisions as time passes. Additionally, the facts of any two cases are rarely identical. The goal of a public purpose challenge is not to hamstring the government’s ability to pursue economic development projects, but to prevent corrupt giveaways to insiders and special interests. Hence, there is always a possibility that the action to be challenged will simply be more egregious than the previous one before the state high court. Finally, nearly all the existing precedent at the core of today’s doctrine was set in cases involving private plaintiffs. If the attorney general believes, as is argued in this paper, that the identity of the plaintiff may be able to affect the doctrine, then he should go forward with a public purpose challenge even in the face of negative case law.

III

In a public purpose challenge, the attorney general may be a superior plaintiff compared to a private party in at least three ways. First, in states where the attorney general is elected, his democratic accountability to the people may serve to undermine one of the chief tenets of modern public purpose doctrine; that it is undemocratic for courts to interfere with the fiscal decisions of a duly constituted legislature. Second, because of his traditional common law duty to protect the public interest, the attorney general may, in the eyes of the court, better represent the harm caused by a public purpose violation, than would a private plaintiff whose individualized injury may be minimal. Finally, as chief law officer for the whole state, the attorney general may be in

48 See supra n.12.
a unique position to stop the dangerous “race to the bottom” that occurs between localities competing for economic development.

A

The attorney general is independently elected in 43 states. The purpose behind creating an elected position may primarily have been to ensure its autonomy from the governor and strengthen intra-branch checks and balances. However, a popularly elected attorney general can also be seen as enjoying a democratic legitimacy distinct from those who are appointed. Because his authority is derived directly from the people and he remains accountable to them, one could imagine that his policy arguments would be entitled greater weight than those of an ordinary litigant.

As noted above, one of the primary reasons that public purpose suits have failed of late is that courts tend to perceive the inquiry as challenging the wisdom of the legislature’s policy choices. While no plaintiff would suggest that a statute ought to be struck down simply because it is bad policy, the nature of the public purpose inquiry today forces an attack on the effectiveness of legislature’s chosen policy. Because the current doctrine eschews judicial scrutiny of the means implementing the act, but focuses exclusively on the intent behind it, plaintiffs must challenge the sincerity of the legislature’s stated motive. To do this, plaintiffs often submit evidence showing a weak nexus between the legislature’s stated purpose and the effect of the act. For most

49 See Marshall at 2447
50 Common Cause v. Maine, 455 A.2d 1, 17 n. 20 (Me. 1983) (evidence of plaintiffs “has a tendency to show that he defendants and the Legislature may be mistaken in supposing that the benefits of improved commerce and higher employment will be achieved).
courts, this line of argument too much resembles an attack on the merits of the policy, and a judgment for plaintiffs would place the court in the shoes of the legislature.\(^{51}\)

Would a similar argument made by an independently elected attorney general elicit the same result from the courts? State courts have clearly followed the federal bench in shying away from decisions that might appear to impose the will of the judiciary in place of that of the legislature. The principle reason for this is concern about preserving separation of powers, but there is also a majoritarian element to the doctrine. Although there may be legal merit to the plaintiff’s argument, courts may, at least where individual rights are not at stake, be reluctant to allow a single private party disrupt a policy decision arrived at by the majority. Where the attorney general is the plaintiff, this fear is allayed. Indeed, the attorney general’s democratic legitimacy may highlight for the court some of the more undemocratic maneuverings that may have taken place during the legislative process. Where the fear is that special interests may have succeeded in siphoning of public resources for private ends, the attorney general’s popular accountability may stand in stark contrast to that of the legislature.

Suspect deals brokered by state and local agencies, commissions, or authorities may provide an even stronger argument for attorney general participation. Many of the more troubling economic initiatives, especially those conducted on the local level, are not done pursuant to any specific statute. Rather, they are often the product of special public corporations, economic development commissions, and other agencies acting pursuant to delegated authority. These bodies are only loosely democratically accountable, and there

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\(^{51}\) See e.g., *Delogu v. State*, 720 A.2d 1153, 1155 (Me. 1998) (citing *Common Cause*, “we may not strike it down merely because, if we were acting in the role of legislator we would deem it unwise”); *Hayes* at 799 (Whether a project is based on sound economic theories is not within the scope of judicial review).
are sometimes concerns that their members are more closely aligned to the local business community than to the public at large.

The prevalence of “site-location consultants” as middlemen in many deals can cast further doubt on the independence of some public economic development officials. These consultants work both sides of the transaction, and are often paid by the private entity a percentage of the total public incentives ultimately agreed upon. Sometimes they receive as much as a thirty-percent commission.\(^{52}\) To the extent that the local agency relies on economic data supplied by such consultants, there is reason to suspect such information is not objective.

This context provides an opportunity for concerned attorneys general to come into court, asking not for the invalidation of any statute, but only a temporarily injunction of the deal until more facts can be gathered about its likely impact. The attorney general’s democratic credentials will look strong against that of the agency or commission. Further, the attorney general does not seek to thwart the will of the legislature, but rather to add transparency to what, all-too-often, is a closed-door decision making process.

B

The state attorney general is sometimes called the “people’s lawyer.” Going back at least to 18\(^{th}\) Century England, the attorneys general have brought claims for injuries inflicted on the public at large.\(^{53}\) This power, parens patriae, has often been exercised by attorney’s general to vindicate rights that no single plaintiff has a great enough stake in to assert. Thus, it is common for state attorneys general to bring antitrust or consumer

\(^{52}\) Good Jobs Website, “How Site Location Consultants Manipulate Corporate Investment Decisions.”

\(^{53}\) Marshall, 2446.
protection actions on behalf of consumers who may have suffered minimal individual damages. In other cases, private parties may not have a right of action in the first place.

A public purpose challenge may fall somewhere in between the two. Firstly, it is unlikely that any private party will have a financial interest great enough to justify litigating over a violation of the public purpose requirement. The very harm threatened by such violations, that government benefits will flow to a concentrated few at the expense of the general public, means that those most directly effected by such action are likely to support it. Therefore the most probable private plaintiffs in a public purpose case will be what some have called “policy entrepreneurs,” who are usually non-profit citizen groups and the like.54 Such groups may have a difficult time showing injury which can lead to questions about standing,55 and may fail generate much sympathy in the eyes of the court.

In fact, the dearth of viable plaintiffs caused at least one court to bend its traditional standing requirements, where failure to do so would prevent challenge to the state action altogether.56 In justifying this decision, the Maine Supreme Court seemed to bemoan the fact that the state attorney general was not available to challenge the action himself. “It is apparent that the project will not be stopped by the attorney general, who

55 See, Common Cause, at 6-7 (plaintiffs lacked 3rd party standing on equal protection). Interestingly, the Attorney General in this case, while charged to defend the state on the merits, supported the plaintiffs on the issue of standing. This highlights a less direct way attorneys general may be able to strengthen the public purpose doctrine. Where the plaintiff in a public purpose case is private, an attorney general may intervene on his behalf, arguing, on public policy grounds, for a relaxation of the court’s standing requirements. As the Common Cause case shows, this is possible even where the attorney general is statutorily obligated to defend the merits of the state action. The feasibility of such assistance will turn on state doctrines of justicability, specifically those concerning advisory opinions; but the idea is that questions of grave constitutional import should be reached on their merits regardless of what final outcome the attorney general supports.
56 Id. at 7-9
has vigorously defended the state and its officials throughout the action.”

Where courts feel forced into accepting plaintiffs they otherwise would not, simply to maintain some constitutional check on the legislature, is it any wonder that these second-choice litigants do not often receive the benefit of the doubt?

The problem of finding an adequate plaintiff has led to systemic under-enforcement of the public purpose requirement, and, according to Richard Briffault, has shaped the current doctrine. Professor Briffault posits that courts have been reluctant to enforce the public purpose requirement along with other constitutional fiscal restraints in part because such violations are not seen as “creating any harms.”

According to Briffault, affected taxpayers “often do not appear before the court and are effectively invisible. Because of this, “in public purpose cases, new types of government programs do not seem to have any negative effects on individuals at all.”

Would attorney general enforcement yield a different result? Courts are comfortable with the attorneys general raising broad undifferentiated public injuries before them. The attorney general would not need to put on the pretense of showing some miniscule personal injury but instead can focus the entirety of his argument on the totality of the harm. His traditional role as champion of public rights would make this a familiar argument for both sides, and, if the court would look beyond the novelty of an intra-branch lawsuit, the attorney general could be quite persuasive. Where the injury really is spread evenly throughout the public, it might well make a difference to have a legitimate representative of the public before the court as opposed to an individual or

57 Id. at 9
58 Briffault at 943
59 Id.
group pursuing, what the court sees, as a narrow private interest unjustified by personalized injury.

C

There is only one attorney general. In most states he is statutorily obligated to “set a unified and consistent legal policy;” to ensure coherence among the state’s legal positions.\(^60\) Local governments are creatures of the state,\(^61\) and the attorney general’s obligation to uphold the constitution applies as much to their actions as it does to those of the state government proper. This is of particular importance where the public purpose requirement is involved.

As exemplified by Eveleth’s situation with Skyes Enterprises, much economic development occurs on the local level and, correspondingly, many arguable violations of the public purpose doctrine occur there as well.\(^62\) As many commentators have noted, economic development plans are often zero-sum.\(^63\) Further, it has been pointed out, economic development plans seem to have the greatest impact on the margin, where a firm has already decided what region to be in but then plays localities against each other within a discrete metropolitan area.\(^64\) This means that much of the most intense competition for jobs may play out between localities within the same state.\(^65\) Cities and

\(^{60}\) Feeney v. Massachusetts, 366 N.E.2d 1262, 1265 (Mass. 1977) (citing Secretary of Administration & Fin. v. Attorney Gen., 367 Mass. 154 (1975)).

\(^{61}\) Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

\(^{62}\) See supra n.33.

\(^{63}\) See supra n.24; see also Good Jobs First Website, “Overview.”


\(^{65}\) See Maready at 633(Orr, J., dissenting).
counties may find themselves locked in a classic prisoner’s dilemma, battling among themselves to the detriment of both and the state as a whole.

This “race to the bottom” may drive localities toward policies that run up against the public purpose doctrine. In such situations, active enforcement of the requirement by the attorney general could, surprisingly, help rather than hurt the localities involved. The competing entities could use the threat of attorney general intervention to establish a mutually binding “floor.” The pressure each side experienced to undercut the other would be relieved by knowing that any action too far afoul of the letter of the law was likely to trigger suit by the attorney general.

While this is not to say that the attorney general would coordinate economic development policy among localities, his presence as a potential repeat litigant in public purpose actions could serve to establish minimum guidelines. In other words, the state attorney general could announce ex ante the circumstances that would lead him to challenge a local development deal in court. This type of advance warning could ultimately constrain the ruinous competition occurring between neighboring cities.

Unfortunately, success in ending the prisoner’s dilemma depends on whether the attorney general’s threats to enforce the public purpose requirement are credible. That is, whether or not public purpose actions by attorneys general fare any better in the courts than those by private parties recently have. And this in turn depends on the whether attorney general’s democratic credentials and his parens patriae authority would have any effect on the court. For the reasons given above, there is certainly a possibility that they would. However, it is important to remember that there are good reasons why they might not.
First, in its current form, the public purpose doctrine is essentially dead. Stare
decisis concerns would likely keep courts from breathing too much life into it too soon,
no matter who the plaintiff was. Second, as noted above, because courts genuinely
recognize economic development as a legitimate public purpose, government action can
only be struck down where it can be shown to be insufficiently oriented toward that
purpose. Right now there are no clear standards for making this determination and many
cases would be complicated by the fact that benefits may be simultaneously public and
private. Further, even if such standards did exist or some kind of public/private
balancing test was adopted, public purpose cases would still entail difficult empirical
questions that courts might be reluctant to take on.66

IV

A state attorney general could possibly give effect to the public purpose
requirement of the constitution without going into court. First, by simply publicizing
apparent violations of the doctrine, the attorney general may deter future violations and
bring political backlash against the offending public officials. Second, the attorney
general could lobby the state legislature for some type of regulatory authority to pass on
the legality of prospective deals before they become final. If either or both approaches
were successful, a concerned attorney general would be able to uphold the state
constitution without having to navigate the substantial pitfalls of an in-court challenge.

Considering the number of advocacy groups already focused on improving state
and local economic development strategies, attorneys general should be able to gather
information on potential abuses fairly easily. Those wishing to employ the “shame”

66 Briffault at 946.
tactic, would then issue press releases, make speeches, and generally take advantage of their prominent political position to draw attention to violations of the public purpose requirement. At that point, the attorney general’s success in enforcing the requirement would turn largely on his political skill and relevancy.

To aid him in this project, a savvy attorney general could tap into the controversy surrounding eminent domain use stirred by the Supreme Court’s recent decision in *Kelo v. City of New London*. While some libertarians have taken advantage of *Kelo* to attack government regulation wholesale, it seems that what disturbed most people about the case was the city’s transfer of condemned property to private interests. Although the government action at issue in *Kelo* may well have been a legal, it is not difficult to imagine a more extreme takings scenario that could be analogized to a violation of the public purpose doctrine.

Public resentment over *Kelo* could also help an attorney general lobby his state’s legislature for some type of regulatory authority to enforce the public purpose requirement. For example, the attorney general could be required to issue an opinion prior to the public issuance of debt on behalf of private entities. This could apply to local authority and commission action as well. While the current trend in state government is away from rather than toward more regulation, and oversight of local issues could be seen as contrary to the spirit of home-rule; it is still possible a politically skilled attorney general could push such legislation through.

Whether lobbying for enhanced regulatory power over economic development projects or simply publicizing them, it is important to remember that the state attorney

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68 Id.
general is a politician as well as a lawyer. And in this capacity he may have tools to enforce the public purpose requirement beyond those left available by the courts’ doctrine. A determined attorney general would likely pursue enforcement on both fronts.

Conclusion

The attorney general, as a democratically elected official with duties as the state’s chief law enforcement officer, might engender more sympathy from a court hearing a public purpose challenge then would a private plaintiff. The threat of such challenges could also rationalize and soften the zero-sum competition going on between localities for economic development. However, even though most attorneys general arguably have authority to bring this type of action, few do. Research for this paper revealed only one case of a state attorney general bringing a public purpose challenge against another executive department.69 This probably reflects the rarity of intra-executive branch lawsuits and current defendant-friendly state of the doctrine. Further, attorneys general may be aware of, and even supportive of, the reasons why state courts prefer to steer clear from dissecting legislative purposes and evaluating the probability of their achievement.

Yet, as state and local economic development continues to raise difficult problems concerning the proper role of government and the specter of corruption, pressure will likely grow on all branches of government to act. Future attorneys general will not be exempt from this, and they should be able to respond to it by utilizing their special status as state chief law enforcement officer to give the doctrine more bite in the courts, and at the same time exploiting their position as prominent state politicians to draw more attention to violations. In short, a strong attorney general stands a good chance at

improving the quality and fairness of economic development in his state, if that is one of his priorities.